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No. 04-710

Supreme Court, U.S.
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In The
# Supreme Court of the United States

MICHAEL SHOELS AND VONDA SHOELS,
AS PARENTS OF DECEDENT ISAIAH SHOELS,

*Petitioners,*

v.

THOMAS KLEBOLD AND SUSAN KLEBOLD,
WAYNE HARRIS AND KATHERINE HARRIS,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Tenth Circuit**

## RESPONDENTS WAYNE HARRIS' AND KATHERINE HARRIS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Tenth Circuit Court of Appeals correctly affirm the district court's order holding that Michael and Vonda Shoels, as parents of Decedent Isaiah Shoels, entered into binding settlement agreements with Thomas and Susan Klebold and Wayne and Katherine Harris?

## PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings on the Petition for Certiorari are all contained in the caption of the case. All parties are individuals.

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## STATEMENT OF THE CASE

The Petitioners have filed a Petition for Writ of Certiorari on the issue of whether the Tenth Circuit erred in affirming the district court's order granting motions to enforce settlements. The Petitioners' Statement of the Case contains a mix of argument and fact, emphasizing certain evidence and minimizing or excluding other evidence. Set forth below are the relevant facts as determined by the district court and referenced in its opinion and the opinion of the Tenth Circuit Court of Appeals.

During late 2000 and into the first several months of 2001, an effort was undertaken to reach a global settlement among a group of 36 claimants who were asserting claims against Thomas and Susan Klebold, Wayne and Katherine Harris, and other defendants arising from the Columbine High School shootings. During the settlement negotiations, the Petitioners herein, Michael and Vonda Shoels, the parents of Isaiah Shoels, one of the students killed during the shootings at Columbine, were represented by local counsel, Jack Beam and Doug Raymond, as well as out of state counsel, Geoffrey Fieger. App. 7a, 35a-36a.

During the referenced settlement effort, some of the claimants decided not to participate in the group settlement discussions including six claimant families who were represented by James Rouse, (the "Rouse group") and several others. App. 8a, 35a.

Stephen Wahlberg, a local Denver attorney, emerged as the primary spokesperson for the participating group of claimants in negotiations with attorneys for the defendants and with the Judicial Arbiter Group, a local mediation/arbitration firm. Mr. Wahlberg was not authorized to

act on behalf of any other attorneys' clients; however, he acted as a conduit of information or intermediary among the numerous parties involved, relaying communications back and forth between the various defendants and the various plaintiffs. App. 7a, 36a.

In early March 2001, the Klebolds and Harrises, among other defendants, proposed a settlement to the participating group of claimants. The proposal included the arbitration of the various competing claims by the Honorable Jim Carrigan, a former federal judge. App. 8a, 36a, 37a.

On March 8, 2001, Mr. Wahlberg spoke to Mr. Fieger and described the current state of the defendants' offers and the proposed arbitration procedure. Mr. Fieger suggested that each of the death claims should be treated equally under the arbitration procedure. Participating claimants who had death claims based on the death of a family member all agreed that non-economic damages for all death claims would be valued at the statutory cap of $366,000 for the purposes of the arbitration procedure. Mr. Wahlberg submitted a letter to plaintiffs' counsel asking if they concurred with such an arrangement. They all concurred that such a valuation of death claims was agreeable. App. 36a, 41a.

On March 14, 2001, Mr. Wahlberg faxed to counsel for the Shoels a letter from Mr. Rouse stating that Mr. Rouse's clients would not participate in the arbitration as it applied to the Harrises and the Klebolds. App. 9a, 36a-37a.

On April 9, 2001, Mr. Wahlberg communicated with counsel for the Shoels and told them that Mr. Rouse had indicated that his clients would participate in the

arbitration with respect to some of the defendants, but not as to the Harrises and Klebolds. App. 9a, 37a.

In an April 16, 2001 letter to counsel for the Shoels and counsel for other claimants, Mr. Wahlberg outlined, *inter alia*, a settlement offer from the Harrises and Klebolds. The letter advised that the Harrises and Klebolds had agreed to put 98% of their insurance policy limits ($1,568,000) into escrow, leaving the other 2% to cover possible zone of danger claims. Thereafter, the arbiter was to determine what share of the escrowed funds each potential claimant (including non-settling claimants) should receive. The amounts attributable to non-settling plaintiffs would be held in reserve to cover any successful claims and any unused portion of those funds would be distributed to the settling plaintiffs after the statute of limitations expired. App. 9a-10a.

The letter noted that the Rouse plaintiffs were not participating in settlement with the Klebolds and Harrises, but suggested they would participate in other settlements. Mr. Wahlberg also spoke to Doug Raymond, one of the Shoels' local attorneys, discussed the details of the agreement to arbitrate, and discussed the terms of the agreement. App. 9a-10a, 41a.

On April 18, 2001, Mr. Wahlberg called Shoels' counsel, Doug Raymond, and told him that the Rouse group was on board to settle with three defendants, Manes, Anderson and Duran and that he needed to know what the Shoels were doing and asked to have the Shoels' counsel put it in writing. App. 10a-11a, 37a.

Late in the evening on April 18, 2001 or the morning of April 19, 2001, Mr. Wahlberg had another conversation with Mr. Raymond and someone in Mr. Fieger's office, and

reiterated to the person in Mr. Fieger's office that whatever the Shoels decide to do, he needed something in writing. App. 11a.

On April 18, 2001, Mr. Wahlberg dictated a letter to counsel for the Harrises and Klebolds, as well as counsel for Manes, Anderson and Duran, stating that the Harris and Klebold offer was accepted by the claimants. This letter, however, was not sent on April 18, 2001. Instead, the letter was held by Mr. Wahlberg because he had not yet heard from Mr. Fieger as to what the Shoels were doing about settling. App. 38a.

On April 19, 2001, lead counsel for the Shoels, Geoffrey Fieger, sent a letter to Mr. Wahlberg which stated:

> This letter shall serve to confirm that Mr. and Mrs. Shoels have approved settlement with Defendants Klebold, Harris, Manes, Anderson and Duran.

App. 11a-12a, 37a, 42a.

After Mr. Wahlberg received the April 19, 2001 letter from Mr. Fieger at 12:28 eastern time (10:28 mountain time), Mr. Wahlberg faxed Mr. Fieger's letter to all claimants' counsel and defense counsel approximately 10 minutes later at 10:39 a.m., mountain time. The April 19, 2001 letter written by Mr. Fieger was received by counsel for the Harrises and the Klebolds. App. 12a, 38a.

Mr. Wahlberg then edited his letter of April 18, 2001 to reflect the acceptance by Shoels, though he neglected to change the date of the letter, and faxed it to counsel for the Harrises and the Klebolds, as well as all claimants' counsel on April 19, 2001 at 1:09 p.m., mountain time, along with a listing of the claimants whose claims were settled.

Included in that list was Isaiah Shoels whose name was inserted in that list based on the April 19, 2001 letter from Mr. Fieger. App. 12a, 38a.

On April 20, 2001, counsel for the Shoels sent two letters to Mr. Wahlberg. App. 12a, 38a-39a. The first letter stated, in part:

> Notwithstanding the April 19, 2001 letter to you from Geoffrey Fieger that the Shoels have tentatively approved settlement with Klebold, Harris, Manes, Duran and Anderson, the Shoels will not participate in this settlement unless they can get the full deal in writing.

The second letter stated, in part:

> I want to make it clear to you that we were not shocked that there was a settlement. We were shocked that there was a settlement that did not include Rouse's group as to Klebold and Harris.

Mr. Fieger thereafter disavowed that settlement occurred. App. 12a. The Shoels eventually moved to have their case remanded to state court and the Klebolds and Harrises brought motions to enforce the settlement agreement. App. 13a, 34a-35a. After an evidentiary hearing in March of 2003, the district court determined that the Shoels had entered into a binding settlement with the Klebolds and Harrises. App. 34a-45a.

On appeal to the Tenth Circuit, the Shoels argued that 1) Mr. Fieger did not have his clients' authority to settle the claims; 2) the terms of the settlement were too indefinite to constitute a binding agreement; and 3) their mistake about the Rouse group's participation, which they claim was caused by Mr. Wahlberg's misrepresentation, gave them opportunity to void the contract. The Tenth

Circuit determined that the issue of whether Mr. Fieger had his clients' authority to settle was not raised in the district court, but that, even if the issue was proper on appeal, there was no evidence to show Mr. Fieger did not have such authority. The Tenth Circuit agreed with the district court that the settlement was sufficiently definite to form a binding contract. Finally, the Tenth Circuit held that the Shoels could not void the contract on the basis of mistake or misrepresentation. App. 4a-33a.

## REASONS THE PETITION SHOULD BE DENIED

### I. THE TENTH CIRCUIT COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OR SANCTION SUCH DEPARTURE BY A LOWER COURT SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

The district court's factual findings concerning the settlement were made after an evidentiary hearing with full opportunity for the parties to present witnesses and evidence. The Tenth Circuit correctly determined that the district court's findings were not clearly erroneous and properly did not disturb the district court's credibility findings. The Tenth Circuit did not depart from the accepted and usual course of judicial proceeding nor sanction such a departure by a lower court and there is no reason for this Court to exercise its discretion to grant the Petition for Writ of Certiorari.

### A. Petitioners' Argument That They Were Denied Their Seventh Amendment Right To A Jury Trial Was Never Raised In The Courts Below

Petitioners argue for the first time in their Petition for Writ of Certiorari that they were denied their Seventh Amendment rights when the district court held that they entered into a binding settlement agreement. The Shoels did not raise the Seventh Amendment as an issue for the district court to consider or decide, nor did the Shoels raise the issue during their appeal to the Tenth Circuit. Ordinarily, the United States Supreme Court does not decide questions not raised or resolved in the lower court. *See Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401 (1976). Only in exceptional circumstances will this Court entertain issues not raised in the lower court. *Lawn v. U.S.*, 355 U.S. 339, 78 S.Ct. 311 (1958).

A trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it. *United States v. Hardage*, 982 F.2d. 1491, 1496 (10th Cir. 1993). The decision of the district court here was based on a full evidentiary hearing and the enforcement of a settlement agreement under the circumstances does not give rise to an issue of Seventh Amendment constitutional import. While the Columbine shooting was indeed a tragic event for Colorado and the Nation, the legal issues and the decision by the district court to enforce settlement are otherwise unremarkable in nature and no exceptional circumstances exist here to warrant review by this Court of an issue not raised in the lower courts. The Petitioners' Seventh Amendment argument is misplaced and the Court should properly deny the Petitioners' Petition for Writ of Certiorari.

### B. The Tenth Circuit Court of Appeals Properly Affirmed The District Court's Findings That Mr. Fieger Had Authority To Settle The Shoels' Claims

The Tenth Circuit correctly determined that it would be improper for them to reverse the district court on the alleged "lack-of-authority" claim because the issue was not raised in the district court. App. 17a. Mr. Fieger's claim that he did not have authority from his clients to settle was first raised on appeal to the Tenth Circuit. The Tenth Circuit aptly noted:

> Had this issue been properly raised below, both sides could have presented evidence (including perhaps, the crucial testimony of Mr. and Mrs. Shoels) about what the Shoels knew and what they authorized, rather than focusing on Mr. Fieger's intent to settle (which is irrelevant if he lacked authority to settle in the first place).

App. 18a.

Further, upholding the district court's findings, the Tenth Circuit properly determined that there was sufficient evidence to support the finding that Mr. Fieger had the authority to settle the Shoels' claims. App. 16a. There is a presumption that an attorney has express authority to settle unless there is evidence to the contrary in the record. *Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 136, 139 (10th Cir. 1966). A settlement and subsequent judgment entered upon an agreement by the attorney of record will be set aside only upon affirmative proof by the party seeking to vacate the settlement and judgment that the attorney had no right to consent to its entry. *See id.*

As found by the district and circuit courts, there was no affirmative proof in the record that Mr. Fieger lacked authority to settle with the Harrises and the Klebolds. Mr. and Mrs. Shoels did not provide any affidavits or testimony in this matter. Indeed, Plaintiffs' argument on this issue centers on Mr. Fieger's own disavowal of the April 19, 2001 letter sent by him which unequivocally accepted settlement with the Harrises and the Klebolds. Mr. Fieger claimed in his testimony and in his briefing below that this "mis-worded" letter was written by his assistant and was only intended to indicate a "willingness to participate in exploring settlement."

In assessing the facts and the credibility of the witnesses, the district court found that Mr. Fieger's claim that his April 19, 2001 letter was mis-worded was *not credible*. App. 11a, footnote 2, 16a, 42a. The Tenth Circuit concluded that:

> In light of the language of Mr. Fieger's letter and the presumption that an attorney does not act without authorization, the most natural conclusion is that the Shoels also intended to settle. Indeed, there was no hint of a division between the Shoels and their counsel in the proceedings below.

App. 16a.

Moreover, as acknowledged by the district court, Mr. Fieger's suggestion that his letter was not a confirmation of settlement is further belied by the subsequent communications from Mr. Fieger's co-counsel, Douglas Raymond, on April 20, 2001. App. 42a-43a. The first letter from Mr. Raymond stated:

> Notwithstanding the April 19, 2001 letter to you from Geoffrey Fieger **that the Shoels have tentatively approved settlement with Klebold, Harris, Manes, Duran and Anderson**, the Shoels will not participate in this settlement unless they can get the full deal in writing. (emphasis added).

Interestingly, Mr. Raymond's own spin on the April 19, 2001 letter was that the settlement approval set forth in the April 19, 2001 letter was a "tentative" approval of settlement. Such interpretation is nonsense; the April 19, 2001 letter is absolute and unconditional. App. 19a. In any event, Mr. Raymond believed that Mr. Fieger's letter communicated approval of settlement with the Harrises and Klebolds.

Moreover, Mr. Raymond's second letter on April 20, 2001 is even more telling and confirms that the settlement took place:

> I want to make it clear to you that we were not shocked that there was a settlement. We were shocked that there was a settlement that did not include Rouse's group as to Klebold and Harris.

As the district court pointed out, "one day after Mr. Fieger's letter, his co-counsel indicated that a particular settlement proposal was the issue in question when Mr. Fieger's April 19, 2001 letter was sent." App. 42a-43a. Mr. Raymond's April 20, 2001 letters were not an attempt to claim that the unambiguous language of the April 19, 2001 letter was "mis-worded."

There was no suggestion at the time by any of the Shoels' attorneys that the Shoels had not provided Mr. Fieger with authority to settle with the Harrises and

Klebolds. Likewise, there was no credible evidence in the materials filed with the Court nor in the evidence presented at the evidentiary hearing that the Shoels had not given Mr. Fieger authority to settle with the Harrises and Klebolds. Indeed, Mr. Fieger testified that it was he who had the authority to act directly in negotiations on behalf of the Shoels and it was only he who maintained contact with the Shoels and that he would be the conduit of information so there would be no confusion.

As the testimony of Mr. Fieger concerning his letter was not found to be credible and because the other facts belie the Petitioners' position, the Petitioners' attempt to advance Mr. Fieger's testimony as evidence supporting the position that Mr. Fieger did not have authority is improper and fails to raise any issue for this Court to review.

Furthermore, the argument that Mr. Fieger could not have had authority to settle because the Shoels had consistently refused to settle without knowing in advance what they would receive was soundly rejected by the district court and Tenth Circuit. The Petitioners misstate the evidence in this regard. The Tenth Circuit correctly noted the Shoels' settlement intentions notwithstanding that they only knew of the procedure for determining settlement but not the exact dollar amount they would receive:

> [E]ven if Mr. Fieger's long refusal to settle except in return for a fixed dollar amount were probative of a corresponding limitation on his authority, **his apparent willingness to settle so long as the Rouse group settled – even before the arbiter had determined what the Shoels**

> **would receive** – would be just as probative of his authority to do so. (emphasis added).

App. 15a-16a.

The cases cited by Petitioners are inapposite and misapplied by them in the Petition for Writ of Certiorari. In *Hallack v. Loft*, 19 Colo. 74, 34 P. 568 (Colo. 1893), the client himself testified that his attorneys were never authorized to settle his suit and testified "positively that he never settled the cause, nor agreed to dismiss it, and never gave his attorneys, or either of them, authority so to do it. . . . This testimony was not contradicted in any manner." *Id.* at 83. Here, the Shoels were not called to testify and no other evidence was presented that Mr. Fieger was not authorized to settle the Shoels' claims. Indeed, the testimony and evidence was that Mr. Fieger was the only one who could do it.

In *Cross v. District Court,* 643 P.2d 39 (Colo. 1982), the record demonstrated that the attorney who purportedly settled the case for his client had never met, corresponded, nor conversed with the client or his other personal counsel. *Id.* at 41. Here, the evidence demonstrates that Mr. Fieger was the exclusive contact with the Shoels. Further, in *Cross*, the attorney testified that he disclaimed his authority to settle the case within hours after his purported statements that were construed to settle the case. *Id.* Here, there was never any disclaimer of Mr. Fieger's authority (until the issue was untimely raised by Mr. Fieger for the first time on appeal to the Tenth Circuit). Moreover, Mr. Fieger's letter of April 19, 2001 unequivocally states: "This letter shall serve to confirm that **Mr. and Mrs. Shoels have approved settlement** with Defendants Klebold, Harris, Manes, Anderson and Duran,"

(emphasis added) and the two April 20, 2001 letters from Mr. Fieger's co-counsel, Doug Raymond, never once question or contend that Mr. Fieger was without authority to settle the claims.

Likewise in *Radosevitch v. Pegues*, 133 Colo. 148, 292 P.2d 741 (Colo. 1956), the evidence was "undisputed" that the attorney had stated he had no authority from his client to dismiss or settle his client's counterclaim as part of the settlement of the claim against his client. Further, the record was that it was expressly stated and intended as part of the settlement agreement that the settlement would not encompass the counterclaim. *Id.* at 150. The Court of Appeals found that the district court erroneously concluded that the settlement of the claim also operated as settlement of the counterclaim. *Id.* at 152. Here again, by contrast, Mr. Fieger never stated until the appeal that he did not have authority from his clients to settle their claims nor have Mr. and Mrs. Shoels ever stated that Mr. Fieger did not have authority to settle their claims. Further, unlike the settlement documentation in *Radosovitch*, Mr. Fieger's letter of April 19, 2001 was unequivocal in its language. There was no reservation of any kind in that letter.

In *Lewis v. Vache*, 92 Colo. 358, 20 P.2d 554 (Colo. 1933) the evidence was undisputed, as presented by the testimony of the client and her attorney, that the client had expressly instructed her attorney not to compromise. *Id.* at 362. Here, there is no evidence that the Shoels instructed their attorneys not to settle their claims. The testimony of Mr. Fieger that the Shoels would not settle because they did not know the exact amount that they would get is incredible and is not supported by any direct testimony or affidavit from either Mr. or Mrs. Shoels and

is otherwise belied by other evidence in the case. The district court, on the facts and credibility of the witnesses, properly resolved this issue in favor of the Harrises and Klebolds and did not abuse its discretion.

The Court in *Thomas*, 366 F.2d at 139-140, held that one of the clients, who was aware that the negotiations were taking place, had failed to establish that the attorney did not have authority to enter into the stipulation. As to this client, the Tenth Circuit held that the district court had not abused its discretion in refusing to set aside the settlement. *Id.* at 139-140. Like the client in *Thomas* whose settlement was not set aside, the Shoels failed to offer any credible evidence that Mr. Fieger did not have authority to settle their claims. The district court did not abuse its discretion in making its factual determinations.

*Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892 (10th Cir. 1975) is entirely inapposite. There, the attorney represented a group of plaintiffs, some of whom wished to settle, some of whom did not. *Id.* at 892-893. The attorney knew that some of his clients did not want to settle, but, believing that his clients had agreed to be bound by the majority rule, compromised the claims. *Id.* at 893 n.1. The clients who did not want to settle immediately repudiated the settlement. *Id.* at 893. The district court upheld the settlement and dismissal of the claims. *Id.* The Tenth Circuit held that the "majority rule" arrangement was violative of the basic tenants of the attorney client relationship. *Id.* at 894-895. Here, there is no such "majority rule" issue. *Hayes* has no bearing on this case.

Accordingly, the decisions of the district court and the Tenth Circuit Court of Appeals were consistent with

established law and the evidence and this Court should not grant certiorari to review them.

### C. The District Court And Tenth Circuit Court of Appeals Correctly Determined That The Terms Of The Settlement Agreement Were Sufficient

In support of the district court's Order Granting Motions to Enforce Settlement Agreement, the district court received substantial evidence and found that the facts supported the finding that the Harrises and the Klebolds made a settlement offer to the Shoels, that the offer was accepted and that there was sufficient consideration. The district court made extensive findings of fact which support the existence and content of the settlement agreement and the Tenth Circuit correctly determined that the district court did not abuse its discretion.

#### 1. The Offer

While the terms of the offer did not contain the exact dollar amount that the Shoels would receive (the main point of argument advanced by the Shoels), it contained a method by which such amount could be calculated. This is sufficient under Colorado law.

Even where a "price term" is essential, the contact is not void if there is a precise method of settling that term. *See, e.g., Greater Service Homebuilders' Inv. Assn. v. Albright*, 88 Colo. 146, 293 P. 345, 348 (1930) (contract is not void if there is a method of settling essential terms.)

> A contract is not void for uncertainty, even though it does not enter into all the details with respect to its subject matter, if, according to its

> terms, it is sufficiently definite so that it can be ascertained with a reasonable degree of certainty what the parties intended to agree to. Thus tested, the terms of the agreement with respect to each can be readily ascertained.

*Fisk Min. & Mill. Co. v. Reed*, 32 Colo. 506, 510, 511, 77 P. 240, 241 (Colo. 1903) (Where the contract provided that, in consideration of the plaintiffs' pumping the water from all the properties, the defendant should pay them its proportion of the expense of such pumping, the Court stated "the parties did not agree in specific terms how many dollars each should contribute to the expense of drainage, nor what aliquot part of such expense each should bear, but they did agree how the sum which the defendant should pay should be determined.")

The district court properly determined under the law of Colorado and under the facts that the offer from the Harrises and Klebolds was not lacking in essential terms and the Tenth Circuit Court of Appeals properly affirmed the district court's order. App. 16a, 41a.

**2. The Acceptance**

The district court properly found that on April 19, 2001, the Shoels, through their counsel, Mr. Fieger, accepted the offer from the Harrises and Klebolds. App. 41a-42a. Mr. Fieger's April 19, 2001 letter stated in no uncertain terms:

> This letter shall serve to confirm that Mr. and Mrs. Shoels have approved settlement with Defendants Klebold, Harris, Manes, Anderson and Duran.

In addition to being supported by the record facts, the district court's finding that there was an acceptance was

based on determinations of credibility. App. 42a. Nothing in the record suggests the district court's credibility determinations were incorrect. The Tenth Circuit correctly gave due regard to the findings of credibility by the district court. *See Eateries, Inc. v. J.R. Simplot Co., a Nevada Corp.*, 346 F.3d 1225, 1233 (10th Cir. 2003) (citing Fed.R.Civ.P. 52). "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512 (1985). The Petitioners' attempt to support their Petition for Writ of Certiorari with Mr. Fieger's discredited testimony concerning the letter is specious.

Accordingly, the district court did not abuse its discretion when it found that there was an offer with essential terms and there was acceptance of that offer and the Tenth Circuit Court of Appeals correctly affirmed the district court's findings. App. 19a, 43a.

### 3. The Consideration

Finally, the district court properly found that the offer and acceptance were supported by valid consideration. Valid consideration is required to form a contract. *Ireland v. Jacobs*, 163 P.2d 203, 206 (Colo. 1945). Even nominal consideration is sufficient. *Id.* An agreement not to further pursue a valid, legal claim constitutes sufficient consideration. *Russell v. Daniels*, 37 P. 726, 728 (Colo.App. 1894) (agreeing not to pursue a right of appeal).

The record demonstrates that the consideration given by the Shoels was their agreement to not further pursue

their claims against the Harrises and Klebolds and to settle their litigation. The Harrises and Klebolds gave consideration by agreeing to payment of a certain sum, a portion of which would be distributed to the Shoels pursuant to the agreed procedures.

The district court did not abuse its discretion in finding that there was valid consideration supporting the settlement agreement and the Tenth Circuit correctly affirmed the district court's findings. App. 24a, 41a, 43a.

Accordingly, the three parts of a valid contract exist here as supported by the district court's factual findings and credibility determinations. App. 29a.

### 4. Petitioners' Argument Fails

The Plaintiff's case law citations do not support the Plaintiff's argument. In *Difrancesco v. Particle Interconnect Corporation,* 39 P.3d 1243 (Colo.App. 2001) the court held that the existence of a settlement agreement, like any contract, is a question of fact. *Id.* at 1247. If the terms or existence of a settlement agreement are in dispute, the court must hold an evidentiary hearing. *Id.*

In *Difrancesco*, the appellate court conducted a *de novo* review of the trial court's decision because the judge did not make findings of fact and the district court's ruling was based solely on the interpretation of a written transcript of the settlement events. *Id.* Thus, the dispute was not centered on the facts; rather, on the conclusions to be drawn from the written transcript. *Id.* Here, by contrast, the district court held an evidentiary hearing, received testimony from numerous witnesses and considered all the facts and credibility of witnesses. The district court here

made specific findings of fact and credibility determinations.

Moreover, in *Difrancesco*, the agreement to settle was expressly made "subject to" preparation of a written document, and the evidence plainly showed there was a lack of agreement on admittedly material terms. *Id.* at 1248-1249. Here, the district court, with substantial record support, found that there was no lack of essential terms. The *Difrancesco* court recognized that one term – the royalty rate – was not sufficient because it did not specify how the rate is to be calculated, that no method of reaching specific royalty terms was identified. *Id.* at 1249. By contrast here, because there was a precise method of calculating the amount the Shoels would receive, the district court properly held that the "price term" was sufficient. The Tenth Circuit correctly distinguished *Difrancesco*. App. 20a-21a.

Further, the Tenth Circuit correctly rejected the Shoels' attempt to argue that the Harrises' and Klebolds' settlement was "subject to" the signing of a release and the signing of the Arbitration Agreement. App.22a-23a. The lack of signature on the arbitration agreement did not preclude the existence of the settlement, particularly when the Shoels had already agreed to be part of the arbitration proceedings and particularly when Mr. Fieger unequivocally accepted the offer on April 19, 2001. As for the requirement of a release, the necessity of a release was part of the offer accepted by the Shoels.

The Shoels' argument that because no release was signed there is no contract simply puts the cart before the horse. It was not the signing of the release that created the settlement; the Shoels by settling were obligated to

sign the release. Moreover, Mr. Fieger did not deny that there could have been an agreement to settle without the release or the Arbitration Agreement actually having been signed. The Tenth Circuit properly found that "the district court's determination that there was a binding acceptance has ample record support." App. 24a.

*New York Life Ins. Co. v. K.N. Energy, Inc.*, 80 F.3d 405, 410-411 (10th Cir. 1996) and Petitioner's citation to the Restatement 2d Contracts are inapposite. In *K.N. Energy*, the purported agreement was marked by its use of the conditional tense to describe what "would be" the case if the deal were consummated and it specifically stated that the deal would not be consummated until the parties reached "final agreement upon terms, conditions, covenants and other provisions satisfactory to Prudential." *Id.* at 411. Such is not the case here and the Tenth Circuit properly rejected that case as authoritative. App. 24a. Furthermore, the "price" term in the present case was sufficient because there was a procedure by which the price term would be determined, making the Restatement 2d Contracts also inapplicable.

The district court's Order and the Tenth Circuit's opinion were well reasoned and were correct in their factual and legal findings and conclusions and there is no basis for this Court to grant the Petition for Writ of Certiorari.

### D. The District Court And Tenth Circuit Court of Appeals Correctly Determined That There Was No Misrepresentation Or Mistake

The Shoels argue that Mr. Fieger's April 19, 2001 letter was a mistake induced by a material misrepresentation of

fact by Mr. Wahlberg. The Shoels argue that, had they known the Rouse group was not settling with the Harrises and Klebolds, Mr. Fieger would not have sent the April 19, 2001 letter on their behalf settling with the Harrises and Klebolds.

Initially, such argument is inherently and wholly inconsistent with the position taken by the Shoels that the letter of April 19, 2001 was "mis-worded" and that the Shoels by that letter had not agreed to settle. The presentation of this "alternative" theory is rather telling.

Nevertheless, as the district court found on the evidence presented, the Shoels' counsel were aware on April 19, 2001 that the Rouse group was not settling with the Harrises. Because of the extensive and consistent notification to the Shoels that the Rouse group was not participating, the district court properly found that an April 13, 2001 letter that included the phrase "everyone else has signed" could not reasonably be read by the parties as indicating the Rouse group had suddenly decided to participate in the arbitrations as to the Harrises and Klebolds. App. 43a-44a.

In any event, the Tenth Circuit correctly held that a unilateral mistake is not a ground for setting aside an agreement, citing *Royal v. Colorado State Personnel Board*, 690 P.2d 253, 255 (Colo.App. 1984) (enforcing a settlement agreement). The Tenth Circuit also properly rejected the Shoels' arguments 1) that there was no meeting of the minds; 2) that the equities favor setting aside the agreement; or 3) that any mistake was the result of misrepresentation or fraud. App. 26a.

The Tenth Circuit properly rejected the Plaintiff's reliance on *Powder Horn Constructors, Inc. v. City of*

*Florence*, 754 P.2d 356 (Colo. 1988) and the Restatement 2d Contracts § 153.

The *Powder Horn* court based its decision on policy considerations which are not applicable here:

> In reviewing the competing policy considerations presented here, we conclude that, in the absence of controlling legislation, a bidder for a public construction contract who submits a bid containing a mistake may rescind the bid prior to its acceptance if the bidder establishes by a preponderance of the evidence that the mistake is of a clerical or mathematical nature, that the mistake was made in good faith and relates to a material aspect of the bid, and that the public authority did not rely to its detriment on the mistaken bid.

*Id.* at 363. These considerations are not pertinent in the present case and the Tenth Circuit's rejection of this case as authoritative was proper. App. 28a-29a.

The Tenth Circuit also correctly rejected the Shoels' Restatement argument, noting that the relief from a unilateral mistake comes only where the contract is unconscionable or where the defendant knew or had reason to know of the mistake. There was no evidence of unconscionability or that the Harrises or Klebolds knew of any alleged mistake or caused any alleged mistake. App. 30a.

Finally, as to the Petitioners' argument that the contract was a product of misrepresentation, the Tenth Circuit correctly rejected this argument. App. 30a-33a. The Tenth Circuit properly concluded: "Misunderstanding, not

misrepresentation, was the basis for Appellants' acceptance, and so they cannot evade the normal limitations on relief from the consequences of their mistake." App. 33a.

## CONCLUSION

WHEREFORE, based upon the arguments and authorities set forth herein, Respondents Wayne Harris and Katherine Harris respectfully request that the Court deny the Petition for Writ of Certiorari.

Dated: December 23, 2004.

Respectfully submitted,

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